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In the Supreme Court of the United States

OCTOBER TERM, 1993

HOUSE OF RAEFORD FARMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner's method of distributing "vote no" T-shirts during the union's election campaign tended to restrain employees in their choice of a collective-bargaining representative in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

2. Whether the Board reasonably concluded that a supervisor was speaking for management, and not expressing a purely personal opinion, when she told approximately ten employees that "we might both be out of a job" if the union won the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-43) and an order amending the opinion (Pet. App. 3) are unreported, but the judgment is noted at 7 F.3d 223 (Table). The decision and order of the National Labor Relations Board (Pet. App. 44-82) and the decision of the administrative law judge (Pet. App. 83-315) are reported at 308 N.L.R.B. 568.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1993. The court of appeals issued an order amending its opinion on October 6, 1993. A petition for

rehearing was denied on October 18, 1993. Pet. App. 1-2. The petition for a writ of certiorari was filed on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner employs approximately 1000 workers in the processing and sale of turkey and chicken products at a plant in Raeford, North Carolina. On August 2, 1988, the union[1] began an organizing campaign at the plant, and on August 15, 1988, it filed a representation petition with the National Labor Relations Board (Board). Pet. App. 11, 16, 18, 87, 89, 99. During the union campaign, petitioner provided Beatrice McCrae, the supply room clerk, with 1000 "vote no" T-shirts for distribution to employees. McCrae, with the approval of petitioner's president, denied T-shirts to employees who were wearing pro-union apparel, and compiled a list of employees who had received "vote no" T-shirts. *Id.* at 63-64. The day before the election, Annie Gilchrist (a supervisor in the cutup and packing department) held one-on-one conversations with eight to ten employees, in which she stated: "I'm not asking you how you plan to vote. I need my job and if the Union come [*sic*], we both might be out of a job." *Id.* at 28, 67.

2. After losing the election by a vote of 420 to 391, with 29 challenged ballots (Pet. App. 52 n.6), the union filed unfair labor practice charges. On February 28, 1989, the Board's General Counsel issued a consolidated complaint alleging that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). Pet. App. 84-85. The complaint alleged, *inter*

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[1] Local 204, United Food and Commercial Workers Union.

alia, that the conduct of McCrae and Gilchrist was in violation of the Act. *Id.* at 286-289, 300-302.[2]

After a hearing, an administrative law judge (ALJ) dismissed the complaint. Pet. App. 314-315. The ALJ found that the list of employees who had received "vote no" T-shirts was used to keep track of supply room inventory rather than to poll employees respecting their union sentiments. *Id.* at 302. The ALJ also observed that no employees were in fact "coerced or pressured" into wearing the T-shirts. *Ibid.* In addition, the ALJ concluded that supervisor Gilchrist's comment was a permissible expression of personal opinion, since she had not represented to the employees with whom she spoke that she was speaking on behalf of management. *Id.* at 289.

The Board rejected the ALJ's findings and conclusions. Pet. App. 62-70.[3] The Board found that petitioner's method of distributing the "vote no" T-shirts violated Section 8(a)(1) because it reasonably tended to interfere with the employees' free choice of a collective-bargaining representative. Pet. App. 64-66. The Board observed that "employees were required to refrain from displaying support for the Union and sign a list acknowledging receipt of the T-shirt" in order to obtain one. *Id.* at 65. The Board explained that "[s]uch employer recordkeeping of the employee's antiunion sentiments enables [petitioner] to discern the leanings of employees, and to direct pressure at particular employees in its

[2] The union also filed objections to the election, which essentially tracked its unfair labor practice charges. Pet. App. 86 n.2.

[3] The Board agreed with the ALJ, however, that petitioner had not discharged certain employees for engaging in protected union activity. Pet. App. 46 n.3, 88-215. No issue respecting those discharges is presented here.

campaign efforts." *Ibid.* "Given the circumstances of this case," the Board concluded, "it would be reasonable for the employees to conclude that the recording of employees' names as they received the antiunion T-shirts was done for purposes other than merely monitoring supplies." *Ibid.*

The Board also found that supervisor Gilchrist's statements violated Section 8(a)(1) because they amounted to "implicit threats that the plant would close if the employees selected the Union as their bargaining representative." Pet. App. 67. The Board observed that Gilchrist's remarks "clearly conveyed to employees that they might be out of a job should the Union be voted in." *Id.* at 68. Moreover, the Board found that "nothing occurred in these conversations to indicate to employees that Gilchrist was speaking in other than her capacity as a supervisor for [petitioner]." *Ibid.* Gilchrist had initiated the conversations, which occurred in work areas, and she had not advised the employees with whom she spoke that she was simply expressing her personal opinion. *Id.* at 68-69. To remedy petitioner's unfair labor practices, the Board entered a cease-and-desist order and required petitioner to post an appropriate notice. *Id.* at 73-76.[4]

3. The court of appeals enforced the Board's order in relevant part. Pet. App. 3, 4-33.[5] The court observed that

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[4] The Board also concluded that a new election was warranted because of petitioner's unfair labor practices. Pet. App. 73, 76-80. That aspect of the Board's order was not before the court of appeals, see *NLRB* v. *Falk Corp.*, 308 U.S. 453, 459 (1940), and no issue respecting it is raised here.

[5] In addition to the unfair labor practices discussed above, the Board found that petitioner had violated Section 8(a)(1) of the Act by soliciting employee grievances and engaging in related conduct designed to discourage union activity. Pet. App. 47-62. The Board

"[i]n evaluating an employer's conduct under [S]ection 8(a)(1), the test is not whether the language or acts *were coercive in actual fact*, but whether the conduct in question had a *reasonable tendency* in the totality of the circumstances to intimidate." *Id.* at 25 (internal quotation marks omitted). Noting that the Board is "possessed of large discretion," *id.* at 22, the court of appeals held that, on the facts of this case, the Board had rationally concluded that petitioner's method of distributing the "vote no" T-shirts had a reasonable tendency to intimidate or coerce employees. *Id.* at 26. The court pointed out that McCrae's refusal to give a T-shirt to any employee wearing pro-union attire had caused pro-union employees to become more identifiable, that employees had complained to a supervisor about McCrae's practice, and that, by requiring employees to sign a list upon receipt of a T-shirt, the possibility of identifying pro-union employees was increased. *Id.* at 26-27.

The court of appeals also affirmed the Board's conclusion that supervisor Gilchrist's statements violated Section 8(a)(1). Pet. App. 32-33. It acknowledged that Gilchrist's remarks could plausibly be construed as mere expressions of personal opinion. *Id.* at 31-32. The court determined, however, that "[i]t seems an equally reasonable and fair conclusion of the NLRB that employees, often intimidated by or even respectful of supervisors, could interpret Gilchrist's remarks as the comments of a

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ordered petitioner to cease and desist from that conduct. *Id.* at 74. The court of appeals concluded, however, that this finding was not supported by substantial evidence, and it therefore declined to enforce that portion of the Board's order. *Id.* at 11-20. No issue respecting that aspect of the court of appeals' decision is presented here.

[c]ompany official, as opposed to the opinion of a concerned coworker." *Id.* at 30-31. Observing that "[t]he question is whether the statements had a 'reasonable tendency' under the circumstances to intimidate," the court noted that Gilchrist did not explicitly tell employees with whom she spoke that she was "giving her personal opinion or voicing her own fears"; that "[c]learly, the remarks conveyed the specter of layoffs in the event of a Union win"; and that the conversations took place during work hours in the work area and not, for example, in a social setting or during a lunch break. *Id.* at 29-30.[6]

Judge Wilkinson dissented. Pet. App. 33-43. In his view, the Board's unfair labor practice findings were "based on flawed presumptions rather than substantial evidence." *Id.* at 42.

ARGUMENT

1. Petitioner contends (Pet. 18) that the Board's determination regarding the distribution of "vote no" T-shirts represents an unwarranted expansion of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). In petitioner's view, the Board has proscribed conduct which is "neither threatening, intimidating, nor coercive, but which merely creates an 'opportunity', never acted upon, to engage in threatening, intimidating, or coercive conduct." Pet. 18. This contention is without merit.

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[6] Since Gilchrist's remarks had a reasonable tendency to intimidate employees under the circumstances presented, the court of appeals recognized that her statements did not fall within the protection of Section 8(c) of the Act, 29 U.S.C. 158(c), which provides: "The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." Pet. App. 29.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act.[7] As the Board explained, the inquiry under Section 8(a)(1) is an objective one. Pet. App. 66 n.12. The relevant question, as the court of appeals noted, is "not whether the langu ge or acts *were coercive in actual fact*, but whether the conduct in question had a *reasonable tendency* in the totality of the circumstances to intimidate." *Id.* at 25 (internal quotation marks omitted); accord *NLRB* v. *Marine Optical, Inc.*, 671 F.2d 11, 18 (1st Cir. 1982); *Weather Tamer, Inc.* v. *NLRB*, 676 F.2d 483, 488 (11th Cir. 1982). Thus, whether petitioner in fact coerced employees by means of the distribution of the T-shirts is not dispositive. The issue instead is whether the distribution of the T-shirts, under all the circumstances, had a reasonable tendency to restrain the employees respecting their choice of a collective-bargaining representative.

Applying its objective test to the facts of this case, the Board concluded that petitioner's "recording of names of those accepting the T-shirts reasonably tended to interfere with the employees' free choice of a collective-bargaining representative, and violated Section 8(a)(1) of the Act." Pet. App. 65-66. The record fully supports the Board's conclusion. Rather than "simply provid[ing] a supply of T-shirts at a central location, unaccompanied by any coercive conduct," petitioner required employees to refrain from displaying support for the union in order to receive "vote no" T-shirts. *Id.* at 64-65. Although several employees complained about this requirement, it

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[7] Section 7 of the Act, 29 U.S.C. 157, provides in pertinent part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations."

was approved by Marvin Johnson, petitioner's president, who asserted that "the employees had to be one way or the other." *Id.* at 63-64. Moreover, petitioner required employees receiving a T-shirt to sign a list acknowledging receipt. *Id.* at 65. Maintenance of such a record, the Board explained, allows an employer "to discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts." *Ibid.* Accordingly, "it would be reasonable for the employees to conclude that the recording of employees' names as they received the antiunion T-shirts was done for purposes other than merely monitoring supplies." *Ibid.*

Contrary to petitioner's contention, neither the Board nor the court of appeals found that the method of distributing the anti-union T-shirts violated Section 8(a)(1) merely because it afforded petitioner "an *opportunity* to pressure or coerce employees." Pet. 21-22. Recording the names of employees who took anti-union T-shirts, coupled with the denial of such T-shirts to employees displaying support for the union, was similar to polling or interrogating employees concerning their union sentiments. Even if petitioner took no action based on the information it obtained, its conduct had a similar tendency to intimidate or coerce the employees. See, *e.g.*, *W.A. Sheaffer Pen Co.* v. *NLRB*, 486 F.2d 180, 182 (8th Cir. 1973) (employer's distribution of a questionnaire violated Section 8(a)(1) in light of "its unmistakable potential for abuse of the employees' protected [Section] 7 rights"); *Midwest Regional Joint Board, Amalgamated Clothing Workers* v. *NLRB*, 564 F.2d 434, 445 (D.C. Cir. 1977) (polling violated Section 8(a)(1) where it "placed employees in jeopardy of unwittingly or unwillingly disclosing their [u]nion sympathy").

Nor is there merit to petitioner's assertion (Pet. 22) that its distribution of the "vote no" T-shirts was conduct privileged by Section 8(c) of the Act.[8] Section 8(c) permits an employer "to attempt by speech or otherwise to influence and persuade employees in their ultimate choice [of a collective-bargaining representative], so long as the persuasion is not violative of the express provisions of the Act." *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953). Although petitioner was entitled to "distribute 'vote-no' t-shirts to gain support for its side during the Union campaign and to 'combat' the 'vote-yes' t-shirts," Pet. App. 24, it was not permitted to employ a method of distribution that violated Section 8(a)(1).

Finally, petitioner contends (Pet. 26-29) that the Board improperly relied upon the standard applicable to election disputes in determining whether an unfair labor practice had been committed.[9] In particular, petitioner takes issue with the Board's reliance (see Pet. App. 65) on *Houston Chronicle Publishing Co.*, 293 N.L.R.B. 332 (1989).[10] There is no merit to this contention. Both the

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[8] See note 6, *supra*.

[9] Board precedent makes clear that the two inquiries are governed by different standards. "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948). For example, the Board will set aside the result of an election where either the employer or the union has delivered a "captive audience" speech to employees within 24 hours of the election, even though such conduct is not an unfair labor practice. See *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

[10] In *Houston Chronicle*, the Board sustained the union's objection to a decertification election and set aside the election result on the basis of the employer's conduct. See also *Gold Bond Building Products, Division of National Gypsum Co.*, 280 N.L.R.B. 1003 (1986), cited by the court of appeals (Pet. App. 24).

Board and the court of appeals applied to the facts surrounding petitioner's distribution of the "vote no" T-shirts the standard governing the inquiry whether an employer's conduct amounts to an unfair labor practice under Section 8(a)(1). Pet. App. 25, 64-66. Indeed, petitioner fails to note that the Board prefaced its citation to *Houston Chronicle* with the introductory signal "cf." (Pet. App. 65), and that the authority cited in direct support of its unfair labor practice finding (*id.* at 66) is *Lott's Electric Co.*, 293 N.L.R.B. 297, enforced, 891 F.2d 281, 282 (3d Cir. 1989) (Table). As petitioner acknowledges (Pet. 31), in *Lott's Electric* the Board found that the employer's distribution of "vote no" buttons during an election campaign amounted to coercive interrogation of employees concerning their union sentiments in violation of Section 8(a)(1). See 293 N.L.R.B. at 303-304.

2. "It is well established that an employer violates [S]ection 8(a)(1) of the Act if it threatens to close the plant or institute layoffs if its employees select union representation." *NLRB* v. *Nueva Engineering, Inc.*, 761 F.2d 961, 966 (4th Cir. 1985). Petitioner characterizes supervisor Gilchrist's statement to employees that "we might both be out of a job" in the event of a union victory as an expression of personal opinion protected by Section 8(c) of the Act. Pet. 33-38. The Board reasonably found, however, that Gilchrist's comments were "implicit threats that the plant would close if the employees selected the Union as their bargaining representative." Pet. App. 67. It noted that Gilchrist had initiated the conversations in which the remarks were made, that the conversations took place in work areas, and that Gilchrist did not qualify her remarks as being her personal opinion. *Id.* at 68-69. Under these circumstances, the Board reasonably concluded that "nothing occurred in these conversations to indicate to employees that

Gilchrist was speaking in other than her capacity as a supervisor for [petitioner]." *Id.* at 68.[11]

[11] Petitioner relies (Pet. 36-37) on *Standard Products Co.*, 281 N.L.R.B. 141 (1986), enforcement denied in part on other grounds, 824 F.2d 291 (4th Cir. 1987), in which the Board found that a supervisor's remark respecting plant closure in the event of a union victory did not violate Section 8(a)(1). That case is readily distinguishable. In *Standard Products*, an employee asked her supervisor "what she thought about a union." 281 N.L.R.B. at 151. The supervisor replied that, in her personal opinion, she was against the union because "she was afraid that if the [u]nion came in, the plant would close down, and she needed her job." *Ibid.* That "casual conversation" occurred nearly one year before the election. *Id.* at 145, 151. Here, by contrast, Gilchrist's remark was made in conversations with eight to ten different employees on the day before the election; it was Gilchrist, not the employees, who initiated the conversations; and Gilchrist did not give any indication that she was expressing a purely personal opinion. Pet. App. 28, 29-30, 68. See generally *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
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